RAP FORM 23

FORM STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
Respondent,)
) No. 55222-1-II
v.)
) STATEMENT OF ADDITIONAL
DOMINIQUE AVINGTON) GROUNDS FOR REVIEW
(your name))
)
Appellant.)

I, DOMINIQUE AVINGTON, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

SEE ATTACHED PAGES

Additional Ground 2

(SEE) ALL ADDITIONAL GROUNDS ATTACHED

If there are additional grounds, a brief summary is attached to this statement.

Date: 11·8·21 Signature: Dominique Avington

[Adopted effective December 24, 2002.]

ADDITIONAL GROUND #1

I WOULD LIKE TO BRING UP AN ISSUE INVOLVING ACCOMPLICE LIABILITY. I KNOW AND THERE IS TESTIMONY, THAT I HAD NO KNOWLEDGE OF ANY OF THE CRIMES CHARGED. I SIMPLY ACTED IN DEFENSE OF MYSELF. EVEN THO I DIDNT MURDER ANYONE OR ASSAULT ANYONE, I WAS STILL CONVICTED OF THOSE CHARGES. THIS CASE WAS VIEWED AND PORTRAYED AS A CASE OF PURE VIOLENCE. MY ACTION AND MY CO-DEFENDENTS ACTIONS WERE AND STILL TIL THIS DAY, SEPERATE. I WAS CONVICTED OF THESE CHARGES BECAUSE I HAD A CO-DEFENDENT. IF I DIDNT, I WOULDNT BE CHARGED OR CONVICTED OF A MURDER OR ASSAULT IN THE FIRST DEGREE. I DID NOT MURDER ANYONE OR ASSAULT ANYONE IN THE FIRST DEGREE AND ~~EVIDCE~~ EVIDENCE, TESTIMONY AND FACTS SHOW THAT!

A PERSON IS AN ACCOMPLICE OF ANOTHER IN COMMITTING A CRIME IF, WITH INTENT TO PROMOTE OR FACILITATE THE COMMISSION OF THE CRIME, HE SOLICITS, REQUESTS OR COMMANDS THE OTHER PERSON TO COMMIT IT, OR AIDS THE OTHER PERSON IN PLANNING OR COMMITING IT. (2) SOMEONE WHO KNOWINGLY, VOLENTARY AND INTENTIONALLY UNITES WITH THE PRINCIPAL OFFENDER IN COMMITING A CRIME AND THEREBY BECOMES PUNISHABLE FOR IT.

BY DEFINITION, AN ACCOMPLICE MUST BE A PERSON WHO ACTS WITH THE PURPOSE OF PROMOTING OR FACILITATING THE COMMISSION OF THE SUBSTANTIVE CRIME OR OFFENSE FOR WHICH HE IS CHARGED AS AN ACCOMPLICE. (STATE V. WHITE N.J. 122. MP CODE § 2.06 ANNOT 1997)).

IT IS A MISSTATEMENT OF THE LAW TO INSTRUCT A JURY THAT A PERSON IS AN ACCOMPLICE IF HE OR SHE ACTS WITH KNOWLEDGE THAT HIS OR HER ACTIONS WILL PROMOTE "ANY" CRIME. IN ORDER FOR ONE TO BE DEEMED AN ACCOMPLICE, THAT INDIVIDUAL MUST HAVE ACTED WITH KNOWLEDGE THAT HE OR SHE WAS PROMOTING OR FACILITATING "THE CRIME" FOR WHICH THAT INDIVIDUAL WAS EVENTUALLY CHARGED.

RCW 9A.08.010(2) THE LAW DEMANDS A SUBJECTIVE STANDARD OF KNOWLEDGE WHEN THE STATE MUST PROVE THE MENS REA OF "KNOWLEDGE" IN ORDER TO CONVICT THE ACCUSED OF A CRIME. TO ESTABLISH ACTUAL KNOWLEDGE A JURY CANNOT CONVICT THE ACCUSED BASED ON "CONSTRUCTIVE KNOWLEDGE", BUT MAY DETERMINE CONSTRUCTIVE KNOWLEDGE TO BE EVIDENCE OF SUBJECTIVE KNOWLEDGE. SEE: (STATE V. JONES No. 36795-9-II, 463 P.3d 738 (2020). WASH. REV. CODE ANN § 9A.08.010(B)(ii)) SEE: (STATE V. PILLON 11 WN. App. 2d 949, 459 P.3d 339 (2020).

STATE V. ROBERTS As WE INDICATE THERE, THE PLAIN LANGUAGE OF THE CULPLICITY STATUE DOES NOT SUPPORT THE STATES ARGUMENT THAT ACCOMPLICE LIABILITY ATTACHES SO LONG AS THE DEFENDENT KNOWS THAT HE OR SHE IS AIDING IN THE COMMISSION OF "ANY CRIME". ON THE CONTRARY, THE STATUTORY LANGUAGE REQUIRES THE ~~POTENTIAL~~ PUTUTATIVE ACCOMPLICE MUST HAVE ACTED WITH KNOWLEDGE THAT HIS OR HER CONDUCT WOULD PROMOTE OR FACILITATE "THE" CRIME CHARGED. WE ALSO NOTED IN "ROBERTS" THAT THE LEGISLATIVE HISTORY OF RCW 9A.08.020 SUPPORTS A CONCLUSION THAT THE LEGISLATURE INTENDED THE CULPABILITY OF AN ACCOMPLICE NOT EXTEND BEYOND THE CRIMES OF WHICH THE ACCOMPLICE

HAS ACTUAL KNOWLEDGE. STATE V. ROBERTS, 142 Wn.2d 471, 510, 14 P.3d 713, 735. FINALLY, WE OBSERVE THAT THE PERTINENT CASE LAW FROM THIS COURT SUPPORTS IMPOSING CRIMINAL LIABILITY ON AN ALLEDGED ACCOMPLICE ONLY SO LONG AS THAT INDIVIDUAL HAS GENERAL "KNOWLEDGE" OF "THE CRIME" FOR WHICH HE OR SHE WAS EVENTUALLY CHARGED. (CITING STATE V. RICE 102 Wn. 2d 120, 125 AND STATE V. DAVIS 101 Wn. 2d 654, 682 P.2d 883 (1984)).

SUMMARY

A) THERE WAS NO PLAN OR COMMON KNOWLEDGE IN PROMOTING "THE" CRIMES CHARGED, LET ALONE ANY CHARGE. BETWEEN ME OR MY CO-DEFENDENT OR ANYONE ELSE FOR THAT FACT. I SIMPLY ACTED IN DEFENSE FROM SOMEONE THREATING MY LIFE.

B) I HAD NO INTENT FOR ANYONE TO GET HURT OR KILLED... I ONCE AGAIN WAS ATTEMPTING TO SCARE SOMEONE THREATNING ME, AWAY!

C) THERE ~~[illegible]~~ WAS NO PLAN, SCHEME OR COMMUNICATION BETWEEN ME OR MY CO-DEFENDENT AND/OR ANYONE ELSE BEFORE OR AFTER. OR DURING THE INCIDENT. I HAD NO $ IDEA OR KNOWLEDGE WHAT HE WAS DOING OR GOING TO ~~[illegible]~~ DO BEFORE, DURING OR AFTER. OUR ACTIONS WERE SEPERATE AND HAD NO COMMON GROUNDS!!! I DIDNT KNOW WHAT HE DID BEFORE THIS INCIDENT.

D) THERE IS IN SUFFICIENCE EVIDENCE OF ACCOMPLICE LIABILITY.

I WAS NOT AN ACCOMPLICE!

REMEDY, TO CHARGES OF MURDER AND ASSAULTS. REVERSE ON THOSE CHARGES AND CHARGE ME SEPERATELY FROM CO-DEFENDENT.

ADDITIONAL GROUND #2

I WAS CONVICTED OF I COUNT OF MURDER IN THE 1ST DEGREE, I COUNT OF MURDER IN THE 2ND DEGREE AND 3 COUNTS OF ASSUALT IN THE 1ST DEGREE. I WAS FOUND GUILTY OF ALL COUNTS. ALSO 3 COUNTS OF ASSAULT IN THE 2ND DEGREE. THEY MERGED ALL COUNTS TOGETHER AND ONLY SENTENCED ME TO THE HIGHEST DEGREE OF THE CHARGES.

THE MERGER WAS INAPPROPRIATE DOTRINE TO USE CAUSE THE PRESUMPTION BECAUSE THE PRESUMPTION OF INNOCENCE SHOULD HAVE BEEN PRESERVED FIRST. BECAUSE THEY FOUND ME GUILTY OF EVERY CHARGE AND LESSERS THERE EXISTS REASONABLE DOUBT

10.58.020 PRESUMPTION OF INNOCENCE - CONVICTION OF LOWEST DEGREE WHEN...

EVERY PERSON CHARGED WITH THE COMMISSION OF A CRIME SHALL BE PRESUMED INNOCENT UNTIL THE CONTRARY IS PROVED BY COMPETENT EVIDENCE BEYOND A REASONABLE DOUBT AS TO WHICH OF TWO OR MORE DEGREES HE OR SHE IS GUILTY, HE OR SHE SHALL BE CONVICTED ONLY OF THE LOWEST.

IN WASHINGTON, IF THE EVIDENCE ADMITS OF A CONVICTION OF A LOWER DEGREE THAN THATS CHARGED, OR OF AN INCLUDED OFFENSE, THE JURY SHOULD BE INSTRUCTED THAT IN CASE OF A REASONABLE DOUBT BETWEEN TWO DEGREES OR OFFENSES, THEY ARE TO CONVICT OF THE LESSER ONLY, AND A GENERAL INSTRUCTION THAT THE GUILT OF THE ACCUSED MUST BE SHOWN...

BEYOND A REASONABLE DOUBT IS NOT SUFFICIENT.

WHEN THE EVIDENCE WOULD SUPPORT A FINDING OF GUILTY ON A LESSER INCLUDED OFFENSE AND AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE IS PROPOSED THEN THE INSTRUCTION MUST BE GIVEN, BOT NOT OTHERWISE. (RCW 10.58.020, 10.61.010) STATE V. STATIONAK 73 Wn. 2d 647. STATE V. GALLAGHER, 4 Wn 2d 437.

EVERY PERSON ACCUSED OF A CRIME IS CONSTITUTIONALLY ENDOWED WITH AN OVERRIDING PRESUMPTION OF INNOCENCE. A PRESUMPTION THAT EXTENDS TO EVERY ELEMENT OF THE CHARGED OFFENSE.
(STATE V. GREDIFORD 130, Wn.2d 747, 759, 927 P.2d 1129 (1996))
(CITING MORISSETTE V. UNITED STATES 342, U.S. 246, 275, 72 S. CT. 240, 96 L.E.d 288 (1952).

REVERSAL OF ~~COUNTS~~ ~~#~~ ~~THROUGH~~ ALL COUNTS AND RESENTENCE AND NEW TRIAL!

ADDITIONAL GROUND # 3

ISSUE

THE "ACT ON APPEARENCES" INSTRUCTION GIVEN IN THIS CASE WAS [redacted] APPROPRIATE FOR HOMICIDE IN THAT IT REQUIRED THE APPRERENCE OF AN "ACTUAL DANGER OF GREAT PERSONAL INJURY." (INST. NO 27, CP 302). WAS IT A REVERSIBLE ERROR NOT TO GIVE A DIFFERENT "ACT ON APPEARENCES" INSTRUCTION FOR THE ASSAULT CHARGES THAT REQUIRED ONLY THE APPEARENCE OF ACTUAL DANGER OF "INJURY"?

ARGUMENT

ME AND MR. SMALLEY TESTIFIED THAT WE FIRED OUR GUNS TO PROTECT OURSELVES [redacted] FROM MR. WALLS, MR. MCINTYRE AND MR. KING. ACCORDINGLY, THE TRIAL COURT GAVE THE JURY SELF-DEFENSE INSTRUCTIONS FOR BOTH THE MURDER AND ASSAULT CHARGES. (CP 299, 301, 302, 303, 304, 327) App. B). THE GENERAL SELF DEFENSE INSTRUCTION FOR THE ASSAULT COUNTS (CP 327), USED THE LESSER STANDARD OF PERCIEVED HARM APPROPRIATE TO A NON-HOMICIDE CHARGE.

HOWEVER, THE ONLY "ACT ON APPEARENCES" INSTRUCTION GIVEN TO THE JURY WAS MODELED ON (WPIC 16.07) USED FOR HOMICIDE AND REQUIRED THAT THE DEFENDENTS BELIEVED IN "GOOD FAITH AND ON REASONABLE GROUNDS THAT HE OR [redacted] ANOTHER IS IN ACTUAL DANGER OF GREAT PERSONAL WJURY". (INST. No. 27, CP 302). I PROPOSED AN "ACT ON APPEARENCES" INSTRUCTION MODELED ON (WPIC 17.04) FOR THE ASSAULT COUNTS THAT ONLY REQUIRED THE APPEARANCE OF ACTUAL DANGER OF "INJURY" (CP 182 (App. A)). THE TRIAL COURT DID NOT GIVE THE PROPOSED INSTRUCTIONS, AND COUNSEL DID NOT EXCEPT TO THAT DECISION.

WHILE PROPER SELF-DEFENSE INSTRUCTION WERE GIVEN FOR COUNT 1, THE MURDER CHARGE, (CP 299, 301-04) WITH REGARD TO THE ASSAULT CHARGES, (COUNTS 3, 4, 5) THE TRIAL COURT FAILED TO GIVE THE APPROPRIATE "ACT ON APPEARENCES" INSTRUCTIONS FOR A NON-HOMICIDAL CHARGE. THE ONLY "ACT ON APPEARENCES" INSTRUCTION GIVEN TO THE JURY IN THIS CASE USED THE HIGHER STANDARD APPLICABLE TO HOMICIDE CASES, THAT THE DEFENDANTS BELIEVED IN "GOOD FAITH AND ON REASONABLE GROUNDS THAT HE AND/OR ANOTHER IS IN ACTUAL DANGER OF GREAT PERSONAL INJURY." (INST NO. 27, CP 302). THIS WAS AN UNCONSTITUTIONAL ERROR.

DUE PROCESS REQUIRES THE STATE TO PROVE THE ELEMENTS OF AN OFFENSE BEYOND A REASONABLE DOUBT. (U.S. CONST. AMEND. XIV; CONST. ART. 1, § 3; STATE V. GREEN, SUPRA.). IN AN ASSAULT CASE, THE LACK OF SELF-DEFENSE IS AN ESSENTIAL ELEMENT UPON WHICH THE STATE BEARS THE BURDEN OF PROOF. (STATE V. ACOSTA, 101 WN. 2d 612, 616-19, 683, P. 2d 1069 (1984)). "BECAUSE THE STATE MUST DISPROVE SELF-DEFENSE WHEN PROPERLY RAISED, AS PART OF ITS BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDENT COMMITTED THE OFFENSE CHARGED, A JURY INSTRUCTION [redacted] ON SELF DEFENSE THAT MIS-STATES THE LAW IS AN [redacted] ERROR OF CONSTITUTIONAL MAGNITUDE." (STATE V. KYLLO, 166 WN. 2d 856, 862, 215 P.3d 177 (2009)). SELF DEFENSE INSTRUCTIONS VIOLATE DUE PROCESS IF THEY MAGNIFY THE HARM A PERSON MUST FEAR TO JUSTIFY THE USE OF FORCE. (SEE id. AT 863). ("A JURY INSTRUCTION ON SELF DEFENSE THAT MISSTATES THE HARM THAT THE PERSON MUST APPREHEND IS ERRONEOUS.")

PEOPLE THREATENED WITH FORCE IN WASHINGTON CAN "ACT ON APPEARENCES" EVEN IF THEY ARE WRONG ABOUT THE DEGREE OF DANGER THEY ARE ACTUALLY IN. (I.E. IF SOMEONE REASONABLY BELIEVES THEY ARE ABOUT TO BE SHOT BUT IT TURNS OUT THE OTHER PERSON IS UNARMED). (STATE V. MILLER, 141 WASH. 104, 105-06, 250 P. 645 (1926)) THE PROPER "ACT ON APPEARENCES" INSTRUCTIONS FOR NON-HOMICIDE CASES IS WPIC 17.04, PROPOSED BY THE DEFENSE BELOW:

> A PERSON IS ENTITLED TO ACT ON APPEARENCES IN DEFENDING HIMSELF OR ANOTHER, IF THAT PERSON BELIEVES IN GOOD FAITH AND ON REASONABLE GROUNDS THAT HE OR ANOTHER IS IN ACTUAL "DANGER" OR "INJURY", ALTHOUGH IT AFTERWARDS MIGHT DEVELOPE THAT THE PERSON WAS MISTAKEN AS TO THE EXTENT OF THE DANGER. ACTUAL DANGER IS NOT NECESSARY FOR THE USE OF FORCE TO BE LAWFUL.

(CP 182) (EMPHASIS ADDED). THE ITALICIZED LANGUAGE OF THE PROPOSE INSTRUCTION TRACKS THE LEGISLATIVE AUTHORIZATION FOR SELF-DEFENSE IN NON-HOMICIDE CASE. (RCW 9A.16.020(3)), PROVIDES THAT "THE USE, ATTEMPT, OR OFFER TO USE FORCE UPON OR TOWARD THE PERSON OF ANOTHER IS NOT UNLAWFUL... WHENEVER USED BY A PARTY "ABOUT TO BE INJURED" (EMPHASIS ADDED).

SIMILARLY, IT WAS A CONSTITUTIONAL ERROR NOT TO GIVE THE PROPER "ACT ON APPEARANCES" INSTRUCTION THAT USED THE LOWER STANDARD OF PERCEIVED DANGER APPROPRIATE TO NON-HOMICIDE CASES. IN THIS CASE THE ERROR CANNOT BE HARMLESS. THERE WAS EVIDENCE THAT AN ACCOMPLICE OF MR. WALLS

HAD ALREADY BROKEN MR. SMALLEY'S TOOTH. MR. WALLS AND TWO OTHERS WERE AGGRESSIVELY ADVANCING ON ME AND EVEN IF I WAS WRONG ABOUT SEEING A GUN IN MR. WALLS PANTS, I HAVE A LEGITIMATE FEAR THAT MR. WALLS MR. McINTYRE OR MR. KING WOULD INJURE ME, EVEN IF THEY WERE NOT GOING TO CAUSE ME GREAT PERSONAL INJURY. THE JURY SHOULD HAVE BEEN INSTRUCTED WITH THE PROPER "ACT ON APPEARANCES" INSTRUCTION AND 3° ASSAULT ~~CONVICTION~~ CONVICTIONS SHOULD BE REVERSED. My APPOINTED COUNSEL PROPOSED THE CORRECT "ACT ON APPEARANCES" INSTRUCTIONS FOR ASSAULT, CP 182, HE DID NOT EXCEPT TO THE FAILURE TO GIVE IT. IF THE STATE RAISES WAIVERS IN ANY WAY, BECAUSE THE ISSUE IS CONSTITUTIONAL, DIMINISHING THE STATE'S BURDEN OF DISPROVING SELF-DEFENSE, THE ISSUE SHOULD BE REVIEWED UNDER RAP 2.5(a)(3). ALTERNATIVELY THE COURT SHOULD HOLD THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT EXCEPTING TO THE FAILURE TO GIVE HIS OWN PROPOSED INSTRUCTIONS. EITHER WAY, THE CONVICTIONS FOR COUNTS 3, 4 AND 5 SHOULD BE REVERSED FOR A NEW TRIAL.

ADDITIONAL GROUND #4

ME AND MY CO-DEFENDENT, DARRY SMALLEY, WERE NOT THE ONLY PEOPLE SHOOTING. THERE WAS NO EVIDENCE AS TO WHOSE BULLETS STRUCK PEARL HENDRICKS. WAS THERE SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION IN COUNT 5?

ARGUMENT

MS. HENDRICKS HAD NOTHING TO DO WITH THE BRAWL THAT BEGAN INSIDE THE CLUB AND CONTINUED OUTSIDE THE CLUB. WHEN THE SHOOTING BEGAN, SHE RE-ENTERED THE CLUB AND WAS SHOT FOUR TIMES. (13 RP 1984-87). THERE WERE MULTIPLE PEOPLE SHOOTING GUNS AND IT IS UNKNOWN WHO SHOT MS. HENDRICKS. THUS, THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR COUNT 5 UNDER THE PROTECTIVE STANDARD OF JACKSON V. VIRGINIA, SUPRA, THE 14TH AMENDMENT AND ARTICLE 1, SECTION 3.

FOR ME TO BE GUILTY OF ASSAULT IN THE FIRST DEGREE FOR COUNT 5, THE STATE HAS TO PROVE THAT I OR AN ACCOMPLICE (1) ASSAULTED MS. HENDRICKS, (2) THE ASSAULT WAS COMMITTED WITH A FIREARM, AND (3) ACTED WITH AN INTENT TO INFLICT GREAT BODILY HARM. INST. NO 41, CP 316. WITH REGARD TO ELEMENT (2), THERE WAS NO DISPUTE THAT A FIREARM WAS USED. REGARDING ELEMENT (3), THIS ELEMENT WAS ALLEGEDLY MET THROUGH THE DOCTRINE OF "TRANSFERED INTENT" BASED ON THE INTENT TO ASSAULT MR. WALLS, MR. MCINTYRE OR MR. KING UNDER INSTRUCTION NO. 20 (CP 295).

THE ISSUE IS WEATHER IT WAS ME OR AN ACCOMPLICE WHO ASSAULTED MS. HENDRICKS. MR. SMALLEY WAS AIMING AT MR. WALLS, MR. McINTYRE AND MR. KING, AND DOES NOT KNOW WHO SHOT PEARL HENDRICKS. (16RP 2402, 2429-30). I ALSO TESTIFIED I WAS NOT AIMING OR SHOOTING AT ANYONE PARTICULAR, (16RP 2501). IF ONLY I OR MR. SMALLEY WERE SHOOTING, THEN THE FACT THAT MS. HENDRICKS WAS AN UNINTENDED VICTIM WOULD NOT MATTER AS TO THEIR LEGAL LIABILITY.

HOWEVER, IN ADDITION TO ME AND MR. SMALLEY THERE WERE OTHERS WHO WERE SHOOTING AS WELL. MOST IMPORTANTLY, THERE WERE SEVEN 9mm CARTRIDGES FOUND IN A PILE IN THE PARKING LOT BEHIND MR. SMALLEY THAT CAME FROM A RUGER. (SEE SUPRA P.8) WHILE THE STATE MAINTAINED AT TRIAL THAT MR. DAVIS WAS THE ONE WHO FIRED THOSE SHOTS, THE JURY FOUND HIM "NOT GUILTY". SO IT IS STILL UNKNOWN WHO THE ACTUAL SHOOTER WAS. BASIC PRICIPLES OF ISSUE PRECLUSION, COLLATERAL ESTOPPEL AND RESPECT FOR THE JURY'S VERDICT SHOULD PRECLUDE THE STATE FROM ARGUING ON APPEAL THAT IN FACT THAT MR. DAVIS WAS ONE OF THE SHOOTERS. (SEE STATE V. KASSAHUN, 78 Wn. App. 938, 948-50, 900 P.2d 1109 (1995)). (ERROR TO ALLOW STATE TO ARGUE DEFENDENT WAS FIRST AGGRESSOR ON RETRIAL FOR MURDER AFTER ACQUITTAL AT FIRST TRIAL FOR ASSAULT OF DECENDENTS GIRLFRIEND). GIVEN THE CHAOS INSIDE AND OUTSIDE THE CLUB, IT IS POSSIBLE THAT THE PERSON RESPONSIBLE FOR FIRING THOSE ROUNDS WAS ACTUALLY FIRING AT ME OR MR. SMALLEY. AND INADVERTENTLY STRUCK MS. HENDRICKS. THERE WERE ALSO TWO .380 CARTRIDGES FOUND INSIDE THE CLUB, (SEE SUPRA AT PP 8-9), AND NO TESTIMONY OR EVIDENCE AS TO WHO FIRED THESE ROUNDS AND WETHER THEIR TRAJECTORY OR RICOCHETING COULD HAVE BEEN RESPONSIBLE

FOR ANY OF MS. HENDRICKS INJURIES.

THE SIMPLE FACT THAT TWO PEOPLE ON ONE "SIDE" OF A GUN BATTLE DOES NOT MEAN THEY ARE ACCOMPLICES TO THOSE WHO ARE ALSO SHOOTING IF THE OTHERS ARE NOT "ALIGNED" WITH THEM AND SHOOT AN UNINTENDED PERSON. FOR INSTANCE, IN (STATE V. JAMEISON, 4 Wn. App. 2d 184, 421 P.3d 463 (2018). THE COURT OF APPEALS AFFIRMED THE PRETRIAL DISMISSAL OF A MURDER BY EXTREME INDIFFERENCE PROSECUTIONS WHERE SOMEONE SHOOTING AT THE DEFENDENTS FRIEND KILLED A BY STANDER. THE DEFENDENTS WAS NOT AN ACCOMPLICE WITH THE PERSON SHOOTING AT HIS FRIEND. "THEY ENTERED ANY [redacted] FIGHT FROM OPPISITE POLES" AND DID NOT SHARE A "COMMON PURPOSE" (Id AT 205, 207.). THE COURT HELD THAT "WHEN EVIDENCE IS EQUALLY CONSISTENT WITH TWO HYPOTHESIS, THE EVIDENCE TENDS TO PROVE NIETHER." (Id. AT 198).

SIMILARY, IN THIS CASE, IT IS NOT KNOWN WHO FIRED THE SHOTS THAT STRUCK AND PARALYZED MS. HENDRICKS, AND THUS IT IS NOT POSSIBLE TO SAY, BEYOND A REASONABLE DOUBT [redacted] THAT ME OR MR. SMALLEY WAS "THAT" SHOOTERS ACCOMPLICE, A SHOOTER MAY HAVE BEEN ON THE "OPPOSITE" POLE AND WHO DID NOT SHARE A COMMON INTEREST OR PURPOSE WITH ME OR MR. SMALLEY. (UNDER JACKSON V. VIRGINIA, SUPRA, COUNT 5 SHOULD BE REVERSED AND THE CHARGED DISMISSED WITH PREJUDICE.

ADDITIONAL GROUND #5

ISSUE

PROSECUTORIAL MISCONDUCT DENIED ME A FAIR JURY TRIAL..

ARGUEMENT

IT IS MISCONDUCT FOR A PROSECUTOR TO MAKE AN ARGUE THAT MISSTATES OR TRIVIALIZES THE PROSECUTION'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT. (STATE V. LINDSAY, 180 Wn.2d 423, 434, 326 P.3d 125 (2014)). ARGUEMENTS THAT ANALOGIZE THE BEYOND A REASONABLE DOUBT STANDARD TO BEING CONFIDENT ABOUT WHAT IS DEPICTED IN A JIGSAW PUZZLE MAY BE IMPROPER. (SEE LINSAY, 180 Wn.2d AT 434-36)" JURORS COULD UNDERSTAND THE METAPHOR TO DESCRIBE A FAR LESS DEMANDING STANDARD OF PROOF THAN TRUE PROOF BEYOND A REASONABLE DOUBT." (U.S. V. BRADLEY, 917 F.3d 493, 508 (6TH CIR. 2019)).

THE STATE ARGUED FACTS NOT IN EVIDENCE..

THE PROSECUTOR SET UP A FALSE NARRATIVE, NOT BASED ON ANY EVIDENCE AT TRIAL, THAT WE HAD INITIALLY DISPUTED IDENTIFICATION AND ONLY ADOPTED SELF DEFENSE AS A "PLAN B" AFTER THE VIDEO EVIDENCE MADE IT CLEAR THAT WE WERE THE SHOOTERS. (18RP 2660-61) (18RP 2842) (CP 385, 397)

ALSO IN CLOSING, WHEN THE STATE WAS DISCUSSING WHY IT HAD NOT CALLED AS WITNESS VARIOUS PEOPLE IDENTIFIED IN THE VIDEOS AS BEING PRESENT

(MR. BROWN, MR. COOPER, MR. LEGEND). THE STATE ARGUED "THEY WOULD HAVE NEVER TOLD YOU THE TRUTH. THEY NEVER WOULD HAVE SAID: "YOU KNOW WHAT? I LOVE THESE GUYS, BUT YEAH WHAT THEY DID WASNT APPROPRIATE; WHAT THEY DID WAS JUST MALACIOUS" THAT'S NOT BURDEN SHIFTING. THAT'S SIMPLY ASSESSING THE CREDIBILITY OF WHAT THEY HAVE TO SAY." (16RP 2882-83) MR. SMALLEY'S OBJECTION WAS OVERRULED (16 RP 2883)

IT IS MISCONDUCT FOR A PROSECUTOR TO ARGUE FACTS NOT IN EVIDENCE. (STATE V. BELGARDE, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). "A PROSECUTOR COMMITS REVERSIBLE MISCONDUCT BY URGING THE JURY TO DECIDE A CASE BASED ON EVIDENCE OUTSIDE THE RECORD." (STATE V. PIERCE, 169 Wn. App. 533, 553, 280 P.3d 1158 2012)). IN PIERCE, WHEN REVERSING CONVICTIONS FOR MURDER, THIS COURT HELD: "IF IT IS IMPROPER FOR THE PROSECUTOR TO STEP INTO THE VICTIMS SHOES AND BECOME HIS REPRESENTATIVE, IT IS FAR MORE IMPROPER FOR THE PROSECUTOR TO STEP INTO THE DEFENDENTS SHOES DURING REBUTTAL AND IN EFFECT, BECOME THE DEFENDENTS REPRESENTATIVE." (Id AT 554 (EMPHASIS ADDED)).

HERE, THE STATES FIRST SET OF FACTS IT ARGUED THAT WERE OUTSIDE THE RECORD WAS THE FALSE NARRATIVE THAT OUR TESTIMONY ABOUT SELF-DEFENSE WAS A "PLAN B" AND THAT ~~WAS~~ WE CLAIMED WE HAD NOT BEEN INVOLVED IN THE SHOOTING AT ALL. AND THAT IS NOT FACTUAL. THAT STATEMENT WAS FLAGRANT AND ILL-INTENTIONED

SIMILARLY, THERE WAS ABSOLUTELY NO EVIDENCE THAT MR. BROWN, MR. COOPER OR MR. LEGEND (SO CALLED MISSING WITNESSES) WOULD "NEVER HAVE TOLD YOU THE TRUTH" (16RP 2882)

HAD THE STATE SUBPOENAED THEM AND PUT THE ON THE WITNESS STAND IT WOULD HAVE BEEN KNOWN WHAT THEY WOULD HAVE SAID. HOWEVER, IT WAS MISCONDUCT FOR THE STATE, NOT TO COMMENT ON THE FACT OF MISSING WITNESSES, BUT ON THE MISSING WITNESSES' SUPPOSED LACK OF CREDIBILITY.

THE PROSECUTOR CHARACTERIZED "SELF-DEFENSE" AS A "CLAIM" (SUPRA AT p.60 n.44) AND FLIPPED THE BURDEN OF PROOF TO THE DEFENSE TO PROVE THAT THERE WAS "REAL THREAT" AND THAT IF THERE WAS NO EVIDENCE OF A "REAL THREAT" THEN "OUR CLAIM ... JUST FAILS" (18RP 2665-66.) OF COURSE, NOT ONLY DID THE STATE HAVE THE BURDEN OF PROVING THERE WAS NO THREAT, BUT ISSUE IS NOT THAT THERE WAS A "REAL THREAT", BUT THAT THE DEFENDENTS REASONABLY BELIEVED ONE EXISTED. (STATE V. MILLER, 141 WASH. AT 105-06).

THROUGHOUT THE TRIAL, THE PROSECUTOR CALLED INTO QUESTION WHY THE WE WOULD NEED OR WANT GUNS FOR "SELF-DEFENSE" (12 RP 1877). THEY SARCASTICALLY SUGGESTED THAT WE HAD A DUTY TO CONTACT THE POLICE. (16RP 2441) AND INTRODUCED EVIDENCE THAT MR. SMALLEY REMAINED SILENT WHEN INITIALLY CONTACTED BY THE POLICE (13 RP 1967). AND THEY MOCKED ME FOR FEARING THE POLICE. (18 RP 2687)

THE CUMULATIVE NATURE OF MISCONDUCT SHOULD LEAD TO REVERSAL.

MULTIPLE INSTANCES OF MISCONDUCT MAY RESULT IN AN UNFAIR TRIAL, IN VIOLATON OF STATE AND FEDERAL DUE PROCESS, REQUIRING REVERSAL

EVEN IF EACH IMPROPER COMMENT IN ISOLATION WOULD NOT. "THERE COMES A TIME... WHEN CUMULATIVE EFFECT OF REPETATIVE PREJUDICIAL ERROR BECOMES SO FLAGRANT THAT NO INSTRUCTION OR SERIES OF INSTRUCTIONS CAN ERASE IT AND CURE THE ERROR". (STATE V. CASE, 49 Wn. 2d 66, 73, 298 P.2d 500 (1956) (STATE V. PEREZ-MEJIA, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (REVERSING MURDER CONVICTION BECAUSE CUMULATIVE MISCONDUCT DENIED DEFENDENT A FAIR TRIAL).

IT IS APPARENT THAT I WAS DENIED A FAIR JURY TRIAL IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS AND ARTICLE I, SECTION 3, 21 AND 22. THE EXTENT AND NATURE OF THE MISCONDUCT, STRETCHING FROM THE VIOR DIRE TO CLOSING, DEMONSTRATES A SUBSTATIAL LIKELIHOOD IT AFFECTED THE JURY'S VERDICT. (STATE V. EMERY, 174 Wn.2d AT 760). EVEN IF COUNSEL DIDNT OBJECT TO EACH AND EVERY INSTANCE OF MISCONDUCT (A COURSE OF ACTION WHICH WOULD LIKELY HAVE SENT HIM TO JAIL FOR CONTEMPT) NO INSTRUCTIONS COULD HAVE CURED THE PREJUDICE. REVERSAL IS REQUIRED!

FOR THE FOREGOING REASONS, THE COURT SHOULD REVERSE THE CONVICTIONS AND REMAND FOR DISMISSAL OF COUNTS 1 AND 5 AND NEW TRIAL FOR COUNTS 3 AND 4.

NOVEMBER 8TH, 2021 DOMINIQUE AVINGTON